Supreme Court, U.S.
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No. 96-865

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

ROBERT L. BROWN, et al.,
Petitioners,

vs.

PERRY MENDEL,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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January 27, 1997

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REPLY BRIEF OF PETITIONERS

ARGUMENT

This Case Presents a Conflict.

Respondent Mendel denies that there is a conflict among the circuits with respect to the standards to be employed in determining "control person" liability. He does, however, concede that there exist at least "theoretical distinctions" between the control person tests employed by the other circuits and the test employed by the

Eleventh Circuit in this case. (Resp. Brf. p.6.) These conflicting distinctions are not merely theoretical. They are real. Here, Petitioners presented more than sufficient evidence to meet (i) the "participation in the general operations" standard of the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits, and (ii) the "authority to influence and direct the activities" standard of the Second, Third, and Fourth Circuits. (See Pet. at pp. 12-14 for a discussion of the evidence demonstrating Mendel's "participation in the general operations" and of his "authority to influence and direct activities" of KCI.) In contrast, in this case, the Eleventh Circuit required evidence of the "power to control the general affairs" of the entity primarily liable. The "power to control the general affairs" is a far cry from the mere "participation" or "authority to influence" standards imposed by the other circuits, but Mendel's entire argument is based on the erroneous premise that such terms mean the same thing. (Resp. Brf. pp. 6,7.)

Mendel also argues that this case is not proper for certiorari review as Petitioners concede that they were not prejudiced by the lower court's ruling relating to the alleged control person's involvement in the transaction at issue. To be sure, the Petitioners were not prejudiced by the ruling as to the second prong of the test because the lower courts found sufficient evidence of Mendel's involvement in the alleged fraudulent transaction to defeat summary judgment. Contrary to Mendel's argument, however, such finding heightens, rather than lessens, the need for guidance from this Court. This is so because, despite substantial evidence that Mendel actually participated in the allegedly fraudulent transaction, he escaped liability because of the Eleventh Circuit's requirement that he have the "power to control the general affairs" of KCI, not simply participate in the operations of KCI or have the authority to influence KCI, the requirements of

the other circuits. Clearly, a person who was involved in the alleged fraudulent transaction and who participated in and influenced corporate operations as Mendel did here would not be due summary judgment in any circuit other than the Eleventh. Such an inconsistent result underscores the need for guidance from this Court.

Finally, Respondent completely ignores the most compelling evidence of Mendel's control person status after his resignation from KCI's Board, which was Mendel's power to approve or disapprove the transaction at issue. The uncontroverted evidence is that, while still Chairman of KCI, Mendel insisted that the Restructuring Plan be made subject to the approval of KCLC's Board of Directors which, of course, Mendel chaired at all relevant times. Thereafter, although Mendel did formally resign his position with KCI, he attended a KCI board meeting to discuss a revision of the Restructuring Plan and later, as Chairman of KCLC, gave his required approval to the revision. The power to approve, which Mendel bestowed on himself while still Chairman of KCI, is substantial evidence not only of his participation in and authority to influence the operations of KCI as required in all other circuits, but also of his power to control as required by the Eleventh Circuit. (See Pet. at pp. 12-13.) Accordingly, the Eleventh Circuit's ruling is erroneous even assuming the appropriateness of its test.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, the Court should grant the petition to review the important question presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James L. North, a member of the Bar of this Court, hereby certify that on this the 27th day of January, 1997, three copies of the Reply Brief of Petitioner in the above-entitled case were mailed, first class postage prepaid, to the following:

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I further certify that all parties required to be served have been served.

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